Supreme Court, U.S.
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No. 92-1306

In The

Supreme Court of the United States

October Term, 1992

TONY ALAMO,

Petitioner,

v.

ROBERT A. MILLER; KODY MILLER by ROBERT A. MILLER; ROBERT MILLER by ROBERT A. MILLER; CAREY MILLER; JEREMIAH JUSTIN MILLER, by CAREY MILLER; RICK MILLER; AND JAMES MILLER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY BRIEF

EDWIN VIEIRA, JR.
13877 Napa Drive
Manassas, Virginia 22111
(703) 791-6780

Counsel of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

Pursuant to Rule 15.6 of the Rules of this Court, petitioner Tony Alamo ("Alamo") replies to the brief in opposition of respondents Robert A. Miller *et alia* ("the Millers").

ARGUMENT

I. The Millers' silence concedes that the "non-default default judgment" imposed on Alamo in *Miller I* and upheld in *Miller II* is unprecedented and undefendable.

The Millers say ***NOTHING*** about the creation in *Miller I*[1] and implicit approbation in *Miller II*[2] of the **"non-default default judgment"** against Alamo, although this is a (if not the) major issue of due process he raises.[3] Their silence admits that the **non-default default judgment** is both unprecedented and undefendable, and therefore that a writ of certiorari should issue.[4]

It is bad enough that *Miller I* held *Alamo* to be the *alter ego* of the corporations, even though *he* never had *his* "day in

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[1] Miller v. Tony and Susan Alamo Foundation, 924 F.2d 142 (8th Cir. 1991).

[2] Miller v. Alamo, Nos. 92-1447WA & 92-2205WA (8th Cir. 1992), *in* Petition for a Writ of Certiorari ("Pet. Cert.") at 1a.

[3] *See* Pet. Cert. at 19-23. The Millers cryptically allude to this matter when they suggest that "there is nothing inconsistent about holding that Mr. Alamo entered an appearance [in the District Court through the supposed *alter-ego* corporations] but did not file an answer or otherwise defend, and was therefore placed in default". Brief in Opposition to Petition for Writ of Certiorari ("Br. Opp.") at 8. If, however, the corporations' appearances constituted an appearance by Alamo perforce of their *alter-ego* status, their further actions – such as denying all liability in their answers to the Millers' complaint – must also be attributed to Alamo, thereby rendering entry of a *default* against him impossible. *See* Pet. Cert. at 9-10.

[4] Rule 10.1(c) of the Rules of this Court.

court" on that issue[5], and worse yet that *Miller I* then parlayed this misuse of the *alter-ego* doctrine into what should be a legally unthinkable **non-default default judgment** – but truly intolerable for this Court to blink such a travesty when the parties profiting from it speak not a syllable in its defense.

II. The Millers' silence concedes that their attempts to locate Alamo did not satisfy the constitutional standard for "diligent inquiry" absent which use of Arkansas Rule of Civil Procedure 4(f) denies due process of law.

The Millers do not attempt to prove that their efforts to locate Alamo constituted the *constitutional* minimum of "diligent inquiry" necessary for service by publication under Arkansas law.[6]

Instead, they now argue – as they explicitly chose *not* to do below[7] – that Alamo was not personally served because he was a "fugitive".[8] But the District Court in the original action made *no* finding that service under Arkansas Rule of Civil Procedure 4(f) was appropriate because of Alamo's alleged

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[5] *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 108-11 (1969), *discussed in* Pet. Cert. at 15-18 *and in* Part III, *post.*

[6] *See* Pet. Cert. at 25-28. To the contrary, they dissemble. *E.g.*, they say they "had no reason to attempt service upon Mr. Alamo between November 16, 1988 and March 27, 1988" [*sic*, 1989 is the correct date]. Br. Opp. at 3. In fact, in *February* of 1989, the Millers sought a continuance precisely in order to serve Alamo. Pet. Cert. at 3-4. Again, they say they "attempted mail service at a second address in Saugus, California, which was listed on some tracts published by Alamo". Br. Opp. at 3. In fact, the Saugus address was well and long known to the Millers as the location of Alamo's church and residence in California, and the locus of the allegedly tortious conduct that underlay their suit against him. Pet. Cert. at 5-6. And again, they say they contacted some law firm in California that did not know Alamo's whereabouts. Br. Opp. at 4. Yet, in fact, another litigant – apparently represented by more diligent counsel – located and served Alamo in California in April of 1989. Pet. Cert. at 11.

[7] *See* Pet. Cert. at 11 & n.34.

[8] Br. Opp. at 5, 9-11.

"fugitive" status, relying only on other, themselves inadequate representations by the Millers as to their supposed "diligent inquiry".[9] The District Court on Alamo's FRCP 60(b)(4) motion held *no* evidentiary hearing on the question at all.[10] And the Court of Appeals in *Miller I* and *Miller II* did *not* rest its decisions on Alamo's claimed "fugitive" status, either.[11]

So, once again, as with the **non-default default judgment**, the Millers importune an appellate court to rationalize *ex post* a favorable result the evidentiary predicate for which they failed to supply *ex ante*. This simply piles due-process insult on due-process injury, highlighting the necessity for this Court to issue a writ of certiorari.[12]

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[9] *See* Pet. Cert. at 5-8.

[10] *Id.* at 6a.

[11] *Miller I* "noted in passing" that he was then "a fugitive", but decided the issue on the basis of the Millers' "affidavit" – which did *not* claim that personal service had been frustrated by Alamo's alleged status as a "fugitive". *Compare* Pet. Cert. at 18a-19a *with id.* at 5-7.

[12] The Millers claim that Alamo's position on his alleged "fugitive" status "was soundly rebutted by the record before the District Judge at the time of the motion". Br. Opp. at 9-10. However, their self-interested assessment of the weight of each side's evidence in the District Court is beside the point – because the court refused to conduct an evidentiary hearing to arrive at its own conclusion. Even if the Millers could have asserted Alamo's supposed "fugitive" status as a "Johnny-come-lately" rationalization for use of ARCP 4(f) (which Alamo denies), he still was constitutionally entitled to prove he was not knowingly a "fugitive" during the critical time-period. So, the Millers wrongly contend that "the District Court agreed with [their] alternative grounds for rejecting Alamo's arguments". Br. Opp. at 14 n.6. The District Court's "bottom line" was *Miller I*, on the supposed authority of which it *denied* the very evidentiary hearing necessary to establish the constitutional facts for any "alternative grounds". *See* Pet. Cert. at 6a.

III. The Millers fail to explain away the fatal inconsistency between *Miller I* and *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969).

The Millers fail to show how *Miller I* can rationally coexist with *Zenith Radio*. Instead, desperately they pretend that,

> [f]irst, the question whether service of process upon one party is sufficient service of process upon a second litigant was never raised or decided in *Zenith Radio*. Second, the purported "alter ego" status of the non-appearing entity had never been litigated or decided, either by the trial court or by other courts in previous cases, as was the situation in the instant case. *Zenith Radio* is therefore distinguishable on its facts * * * .[13]

Hardly. *First*, *Zenith Radio* definitely decided the service-of-process issue. HRI was a named party, served with Zenith's counterclaim; but, said this Court,

> Hazeltine was not named as a party, was never served, and did not formally appear at the trial. Nor was the stipulation an adequate substitute for the normal methods of obtaining jurisdiction over a person or a corporation.[14]

Thus, *Zenith Radio* held a stipulation that a party is the *alter ego* of a non-party insufficient to confer jurisdiction over the non-party which "was never served, and did not formally appear". That is, "service of process upon one *party*" is ***not*** *ipso facto* "sufficient service of process upon a second" *non*-party simply because the two are *alter egos*.

Second, that Hazeltine's *alter-ego* status was stipulated, not litigated, is immaterial.[15] Indeed, even *litigation* of the *alter-ego* issue would not be conclusive. As *Zenith Radio* explained,

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[13] Br. Opp. at 23.

[14] 395 U.S. at 110.

[15] Stipulation to *in personam* jurisdiction is permissible. *E.g.*, Petrowski v. Hawkeye-Security Ins. Co., 350 U.S. 495 (1956).

> [p]erhaps Zenith could have proved and the trial court might have found that HRI and Hazeltine were *alter egos*; ***but absent jurisdiction over Hazeltine, that determination would bind only HRI***. If the *alter ego* issue had been litigated, and if the trial court had decided that HRI and Hazeltine were one and the same entity and that jurisdiction over HRI gave the court jurisdiction over Hazeltine, perhaps Hazeltine's appearance before judgment with full opportunity to contest jurisdiction would warrant entry of judgment against it.[16]

The decision could be no clearer: Had Zenith "prove[n]" Hazeltine's *alter-ego* status, "***that determination would bind only HRI***", already a party to the litigation, "***absent jurisdiction over [non-party]* Hazeltine**" – *i.e.*, absent service of process on Hazeltine.[17] Indeed, had the *alter-ego* issue been litigated ***and had Hazeltine actually appeared "to contest jurisdiction"***, entry of judgment against it would still only ***"perhaps"*** have been warranted.

Third, besides being rejected by *Zenith Radio*, the "critical distinction[]" the Millers claim between a stipulation and "evidence presented at a two-day trial on the question"[18] is a figment of their imaginations.[19]

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[16] 395 U.S. at 111 (***bold-face emphasis*** supplied).

[17] Thus it is not accidental that the Millers suppress the first sentence when they quote this passage from *Zenith Radio*. *See* Br. Opp. at 25.

[18] Br. Opp. at 24.

[19] "A stipulation of fact has the force of a finding"; and courts must treat stipulated facts as "established by the clearest proof". Verzosa v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 589 F.2d 974, 977 (9th Cir. 1978); Schlemmer v. Provident Life & Acc. Ins. Co., 349 F.2d 682, 684 (9th Cir. 1965); Gambill v. United States, 276 F.2d 180, 181 (6th Cir. 1960). Because stipulations "have the effect of eliminating from the trial * * * issues that otherwise might be presented", a trial court need not hold an evidentiary hearing on such issues. Andrews v. St. Louis Joint Stock Land Bank, 127 F.2d 799, 804 (8th Cir. 1942); Emmanuel v. Omaha Carpenters D.C., 560 F.2d 382, 384 (8th Cir. 1977). And a "trial court may not disregard [stipulated] facts * * * or require evidence to support them",

And fourth, the trial between the Millers and *the corporations* alone could not obviate due-process problems in attributing any *alter-ego* finding to *Alamo*. The Circuit Court in *Zenith Radio* denied that

> [Hazeltine] was "adequately represented" * * * on the alter ego question. * * * At no time during the trial did [Hazeltine] have an opportunity to show it was not the alter ego. * * * Zenith's contention that HRI adequately represented [Hazeltine's] interests on the alter ego issue begs the question. On this issue, only [Hazeltine] itself could have protected its own interests.[20]

Moreover, the irrelevance of the lower-court cases the Millers cite shows why *Zenith Radio* is controlling here.[21]

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may not rely on evidence "in direct conflict" with a stipulation, and ha[s] no power to make findings contrary to the terms of a stipulation". United States v. Sommers, 351 F.2d 354, 357 (10th Cir. 1965); Leizerowski v. Eastern Freightways, Inc., 514 F.2d 487, 490 (3rd Cir. 1975); Burstein v. United States, 232 F.2d 19, 22 (8th Cir. 1956).

[20] Hazeltine Research, Inc. v. Zenith Radio Corp., 388 F.2d 25, 30 (7th Cir. 1967), *quoting* Hansberry v. Lee, 311 U.S. 32, 42-43 (1940). Thus, *Zenith Radio* anticipatorily rejected the Millers' claim that Alamo "had a full and fair opportunity to litigate the question whether the corporate litigants were actually mere extensions of himself". Br. Opp. at 25.

[21] Lakota Girl Scout Council, Inc. v. Harvey Fund-Raising Management, Inc., 519 F.2d 634, 636-38 (8th Cir. 1975) (*alter-ego* status of corporation establishes "minimum contacts" with forum; but individual defendant did *not* contest "procedural requirements with regard to service of process"); Certified Bldg. Prods. v. NLRB, 528 F.2d 968, 969 (9th Cir. 1978) (no facts given as to situation *sub judice*); IAM Nat'l Pension Fund v. Wakefield Indus., Inc., 699 F.2d 1254, 1257-59 & nn.5-6 (D.C. Cir. 1983) (*alter-ego* status of one corporation establishes "minimum contacts" of another; but president of second corporation *actually served* with process in forum); Minnesota Mining & Mfg. Co. v. Eco Chem., Inc., 757 F.2d 1256, 1259, 1261, 1264-65 (Fed. Cir. 1985) (after 3M sued ECI (a Minnesota corporation) and moved to add ECL (a Georgia corporation) and two Georgia residents (the Rynnes) as parties pursuant to FRCP 25, *"[a]ll of these parties were properly served with notice of the motion" and appeared at a hearing*, whereupon the court added them "as successors in interest

IV. The state-court judgments entered after *Miller I* did not preclude Alamo's Federal Rule of Civil Procedure 60(b)(4) motion.

Lacking any support in federal law, the Millers invoke as *res judicata* state-court default judgments against Alamo in Arizona and Arkansas, entered after *Miller I*, that supposedly held the corporations to be his *alter egos*.[22] This defense is doubly bootless.

First, when the Millers raised the state-court judgments as a defense to Alamo's FRCP 60(b)(4) motion, he had a right to respond that the judgments were void, because those courts lacked *in personam* jurisdiction over him.[23] But the District Court denied any evidentiary hearing, and ruled for the Millers on the basis, *not* of the state-court judgments, but of the decision in *Miller I* which preceded them. Thus, to interpose the state-court judgments now as a bar *ex post* would be to

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and alter egos" of ECI; court held the Rynnes had "minimum contacts" with Minnesota to satisfy due process); Bally Export Corp. v. Balicar Ltd., 804 F.2d 398, 404-05 (7th Cir. 1986) (corporation contesting service *waived* the issue, and in any event *service was adequate*; in *dicta*, court said that, because corporations were *alter egos*, "service on one * * * is effective as to both" – but cited only *Wakefield Industries*, *ante*, in which corporation contesting jurisdiction had actually been served); *and* NLRB v. Denna Artware, Inc., 310 F.2d 470, 473-74 (6th Cir. 1962) (court has jurisdiction in contempt proceeding to order discovery against affiliated corporations of a corporate party under the "single-enterprise" concept, *but recognizes "a distinction between jurisdiction for * * * entering a judgment in personam and jurisdiction for adjudication in civil contempt"*).

[22] Br. Opp. at 18-22.

[23] A void judgment is "a nullity"; "[a] party cannot be precluded from raising the issue of voidness in a * * * collateral attack because of the failure to object prior to, or at the time of, entry of the judgment"; and a void judgment is "subject to collateral attack in any court where the validity of the judgment c[o]me[s] in issue". Walden v. Craig's Heirs, 39 U.S. (14 Pet.) 147, 154 (1841); Jordan v. Gilligan, 500 F.2d 701, 710 (6th Cir. 1974); 7 *Moore's Federal Practice* (1990), ¶ 60.25[1], at 60-219 (footnote citing Supreme-Court authority omitted).

deprive Alamo of yet another element of due process he was owed, but which was withheld from him, *ex ante*.

Second, if he ever obtains a day in court, Alamo would attack the state-court judgments as void. As to the Arizona case, Alamo has *never* "admitted through his attorney that he had been served by publication" (as the Millers falsely claim).[24]

The Arkansas judgment has a further fatal jurisdictional flaw. On the Millers' motion, on 6 March 1991 the court struck the corporations' answers on the grounds that: (i) the District Court in *Miller I* had stripped them of their "legal capacity to act as * * * independent person[s]"; (ii) they were not the "real parties in interest"; and (iii) they could not defend that case as "surrogate entities" for Alamo while he "remain[ed] a fugitive from justice".[25] Yet, on 23 January 1991 *Miller I* had held that Alamo *had* "appeared" vicariously in the District Court because the corporations, which appeared in actuality, were his *alter egos*; and *Miller I* allowed the corporations to prosecute that appeal, notwithstanding the contention that Alamo was then a "fugitive".[26] Thus, *Miller I* used the *alter-ego* theory to bring Alamo personally *into* court through the corporations – whereas, the Arkansas court employed the same *alter-ego* theory to keep him *out* despite that presence, and notwithstanding that the issue was *res judicata* as between the corporations and the Millers perforce of *Miller I*! *Miller I* violated due process at the jurisdictional level under *Hovey* v. *Elliott*[27] because *Miller I's* unexpected seizure upon the theory of vicarious representation denied Alamo a meaningful notice and opportunity to

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[24] Br. Opp. at 12. The attorney said only that Alamo was "*allegedly* served by publication" (emphasis supplied).

[25] Appellees' Appendix in *Miller* v. *Alamo*, No. 92-1447WAFS (8th Cir), at 649-50.

[26] *See* 924 F.2d at 147.

[27] 167 U.S. 409 (1897), *discussed in* Pet. Cert. at 19-23.

defend his interests at trial and on appeal.[28] The Arkansas court violated due process at the jurisdictional level under *Hovey*, too, by striking the corporations' appearances – because, as against the Millers perforce of *Miller I*, their appearances *were* Alamo's "appearance".[29]

V. *Res judicata* does not bar Alamo's access to his personal property the Millers improperly hold.

Typically, the Millers' assertion of *res judicata* as to the issue of possession of Alamo's personal property begs the

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[28] This is a fundamental requirement of due process. *E.g.*, Armstrong v. Manzo, 380 U.S. 545, 550-52 (1965).

[29] The Arkansas court's theory that, "for sound reasons of public policy, fugitives from justice, including Mr. Alamo, are prohibited from availing themselves of the processes of the courts", also manifestly violates due process. *Pace* Appellees' Appendix, *ante* note 25, at 650, *citing* Molinaro v. New Jersey, 396 U.S. 365 (1970). *First*, cases in the *Molinaro* line denied review of fugitives' criminal convictions because, whether the courts affirmed or ordered a new trial, the fugitives were unlikely to appear. *See* Smith v. United States, 94 U.S. 97, 97 (1876); Allen v. Georgia, 166 U.S. 138, 141 (1897); United States v. Shelton, 482 F.2d 848, 849 (5th Cir. 1973); United States v. Swigart, 490 F.2d 914, 915 (10th Cir. 1973); Arana v. INS, 673 F.2d 75, 76-77 (3rd Cir. 1982) (deportation). Here, distinguishably, both state courts had jurisdiction over real property to satisfy any judgment for the Millers, whether or not Alamo ever appeared in person. *See* Appellees' Appendix at 646, 658-59. *Second*, in civil cases denying access to the courts, the fugitives are typically *plaintiffs*, not defendants. *E.g.*, Ali v. Sims, 788 F.2d 954, 959 (3rd Cir. 1986). Whatever the merits of denying a fugitive *plaintiff* a judicial forum, even in a criminal case "[a] defendant who is granted bail * * * pending trial and then fails to appear does not suffer the penalty of being convicted by default". United States v. Tremont, 438 F.2d 1202, 1203 (1st Cir. 1971). Indeed, even an enemy alien, if sued, has "the right to use all the means and appliances of defense". "If assailed * * * he could defend * * * . The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. * * * It would be contrary to the first principles of the social compact and of the right administration of justice". McVeigh v. United States, 78 U.S. (11 Wall.) 259, 267 (1871) (footnote omitted).

question.[30] For, as Alamo asserts and *Zenith Radio* proves, because *Miller I* did ***not*** properly hold him to be the corporation's *alter ego*, denial of the corporation's motion as to the property had *no* bearing on his rights to bring his own motion on that subject.

CONCLUSION

The Millers' brief illustrates why the writ must issue.

Respectfully submitted,

EDWIN VIEIRA, JR.
13877 Napa Drive
Manassas, Virginia 22111
(703) 791-6780

Counsel of Record for Petitioner

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[30] Br. Opp. at 26-28.